

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-7085

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

B
p/s

Docket No. 77-7085

NORMAN J. BERNSTEIN, HUSBAND
Plaintiff-Appellant

v.

STATE OF FLORIDA, RAYMOND E. RHODES, CLERK
AND INDIVIDUALLY, ALBAN E. BROOKE, DONALD S.
REISMAN, MARGUERITE H. BERNSTEIN, WIFE,
Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF VERMONT

BRIEF FOR
DEFENDANT-APPELLEE, MARGUERITE H. BERNSTEIN

FREDERICK POPE, JR.
of
POPE and PU
67 Main Street
Brattleboro, Vermont 05301



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Statement of the Issues

1. Whether the District Court erred in dismissing the complaint of the Plaintiff-Appellant as to the Defendant-Appellee, Marguerite H. Bernstein.

2. Whether the District Court had jurisdiction of the Defendant-Appellee, Marguerite H. Bernstein.

Statement of the Case

As alleged in the Plaintiff-Appellant's complaint, the Plaintiff-Appellant, Norman J. Bernstein, and the Defendant-Appellee, Marguerite H. Bernstein, were married on May 25, 1957. It is further alleged that in November of 1974 Marguerite H. Bernstein left the State of Vermont and took up residence in the State of Florida, that thereafter she filed for divorce in the Florida courts and that in December of 1975 she was granted a decree of divorce from her husband.

On September 30, 1976, the Plaintiff-Appellant commenced this action in the United States District Court for the District of Vermont. Named as defendants, in addition to the Defendant-Appellee, Marguerite H. Bernstein, were the State of Florida Court, Alban E. Brooke and Donald Reisman. The relief sought against the Defendant-Appellee, Marguerite H. Bernstein, was a judgment that the divorce decree of the Florida court is null and void.

On December 10, 1976, the Defendant-Appellee, Marguerite H. Bernstein filed motion to dismiss the complaint as to her. Similar motions were filed in behalf of some or all of the other defendant-appellees and, after a hearing, on February 1, 1977, the District Court dismissed the complaint. The Plaintiff-Appellant thereupon took this appeal.

Argument

Judge Holden, in his opinion, states that "it appears that none of the defendants were served or found within the State of Vermont." He concluded, therefore, that

The service effected fails to come within the provisions of Fed.R.Civ.P. 4(E), 12 V.S.A. §713, since none of the defendants were within the reach of Vermont's long arm statute according to the teaching of Hansen v. Denckla, 357 U.S. 235, 251 (1958); Pennoyer v. Neff, 95 U.S. 714 (1877); Avery v. Bender, 126 Vt. 342, 345 (1967).

Defendant-Appellee, Marguerite H. Bernstein, respectfully submits that Judge Holden could not have reached any conclusion other than that the District Court did not have jurisdiction of her for the purposes of the Plaintiff-Appellant's complaint.

Section (f) of Rule 4, of the Federal Rules of Civil Procedure provides, in part, that "all process other than a subpoena may be served anywhere within the territorial limits of the state in which the district court is held, and, when authorized by statute of the United States or by these rules, beyond the territorial limits of that state."

It is respectfully submitted (a) that the Defendant-Appellee, Marguerite H. Bernstein, has at all times material to this controversy been a resident and a citizen of the State of Florida, (b) that she was not served within the territorial limits of the State of Vermont, and (c) that service beyond the territorial limits of the State of Vermont is not authorized by a statute of the United States or by any provision of the Rules, specifically by any provision of Section (e) of Rule 4. Nor was there any order of this District Court permitting service on the Defendant-Appellee, Marguerite H. Bernstein, in the State of Florida.

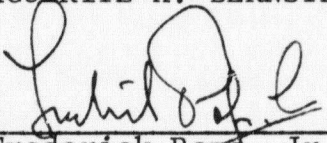
Defendant-Appellee, Marguerite H. Bernstein respectfully submits that, as set forth in Judge Holden's opinion, there are two other bases upon which the Plaintiff-Appellant's complaint ought properly to have been dismissed; improper venue and the fact that it is settled law that the federal courts do not have jurisdiction of the subject of divorce. Defendant-Appellee, Marguerite H. Bernstein submits that no useful purpose will be served in briefing these points in that, in her view, the matter of jurisdiction is determinative of the matter as to her.

Conclusion

Defendant-Appellee, Marguerite H. Bernstein, respectfully requests this Honorable Court to affirm the order of the District Court dismissing the Plaintiff-Appellant's complaint as to her.

Respectfully submitted,

MARGUERITE H. BERNSTEIN

By 

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May 13, 1977

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Honorable A. Daniel Fusaro
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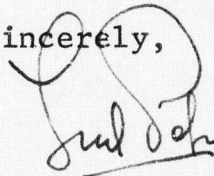
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Dear Mr. Fusaro:

I enclose herewith for filing with the Court ten (10) copies of the Brief for the Defendant-Appellee, Marguerite H. Bernstein.

Copies have been sent to the Plaintiff-Appellant and to other counsel.

Sincerely,



FP:em
Enclosures